Nos. 82-1633 and 82-1762

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL BUILDING COMPANY, PETITIONER

v.

TRUSTEES OF THE REX HOSPITAL, ET AL.

TRUSTEES OF THE REX HOSPITAL, ET AL., PETITIONERS

v.

HOSPITAL BUILDING COMPANY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

No. 82-1633:

1. Whether the court of appeals erred in implying an exemption from the Sherman Act (15 U.S.C. 1 and 2) for private health care providers who conspire to block the construction of competing hospital facilities in a "good faith" effort to prevent needless duplication of facilities in furtherance of national health planning goals, where the proposed facilities actually were not needed.

No. 82-1762:

1. Whether the district court abused its discretion by declining to submit a separate special verdict question to the jury on the issue of plaintiff's preparedness to expand, when the general instructions correctly framed that issue and the written questions that were submitted to the jury permitted the jury to resolve it in favor of either plaintiff or defendants.

2. Whether the injuries plaintiff sustained because of its inability to expand its business are "antitrust injuries" as defined in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), where its inability to expand was proximately caused by defendants' unlawful exclusionary conduct.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

[1] This brief also reflects the views of the Federal Trade Commission.

STATEMENT

1. Petitioner Hospital Building Company ("HBC") operates for profit a proprietary hospital in Raleigh, North Carolina, the Mary Elizabeth Hospital. Respondents are a public, non-profit hospital, which is also located in Raleigh, and two of its officers. In 1970, HBC announced that it would replace Mary Elizabeth's out-moded 49-bed facility with a modern 140-bed hospital (Pet. App. 3a-4a). The two other, larger hospitals in Raleigh, respondent Rex[2] and Wake County Memorial Hospital ("Wake"), were also of the view that the Raleigh area needed more beds, but thought that they should provide them: in May, 1971, they proposed adding 353 beds themselves, with only 11 new beds for Mary Elizabeth (*id.* at 4a).[3]

Under North Carolina law, hospitals seeking to expand needed to obtain the approval of the North Carolina Medical Care Commission ("MCC"). In November, 1971, HBC applied to the MCC for authority to build its new hospital. The MCC in turn referred the application to the Health Planning Council for Central North Carolina ("Planning Council") for an initial

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[2] Respondents Barnes and Urquhart were respectively the chief executive officer and vice-chairman of respondent Trustees of Rex Hospital, and we shall refer to the three respondents collectively as "Rex."

[3] The proposal took the form of a report by the Joint Long-Range Hospital Planning Committee of Wake County, formed by Rex and Wake in 1969. When the report was published Rex had 347 beds (Br. for Appellants (Rex) in the court of appeals, 9) and Wake, owned by Wake County, had 340 beds (Pet. App. 3a-4a).

recommendation (*id.* at 4a).[4] The Planning Council recommended that the MCC deny the Mary Elizabeth application (*ibid.*). Four months later, after an evidentary hearing in which Rex and Wake participated and expressed their opposition, the MCC on June 30, 1972, approved the Mary Elizabeth application (*id.* at 5a).[5] On July 28, 1972, the Planning Council appealed the MCC's decision to the Wake County Superior Court (*ibid.*). Before the case came to decision, however, the North Carolina Supreme Court held that the state's certificate of need law violated the state constitution. *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

With state legal barriers to construction removed, HBC asked the Blue Cross-Blue Shield Association of North Carolina ("Blue Cross-Blue Shield") for a contract under which it would reimburse based on actual charges. Blue Cross-Blue Shield said it would reimburse expenses incurred at Mary Elizabeth only at a lower rate based on a percentage of equity (Pet. App. 5a). It also refused to recognize certain HBC rate increases (Br. in Opp. 10). Ultimately HBC

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[4] The Planning Council was formed in 1964 pursuant to the 1964 Amendments to the Hill-Burton Act, 42 U.S.C. (& Supp. V) 247c, 291-291o, and later designated a "local health planning council" pursuant to the Comprehensive Health Planning and Public Health Services Amendment of 1966 (Pet. 6 n.9; Br. in Opp. 4). Under both statutes, the council was to advise state planning agencies on health facilities. Membership on the council was entirely voluntary, and its role was purely advisory, since no provision of either statute contemplated enforcement of its recommendations. See also page 12 note 15, *infra*.

[5] The MCC gave its initial approval on May 5, 1972, but the Planning Council sought rehearing and final approval did not occur until June 30, 1972 (Pet. App. 5a).

signed a contract with Blue Cross-Blue Shield. Construction of the hospital finally started in 1977, and it opened in that year (Pet. App. 6a).

2. In October 1972, HBC sued Rex under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). In its amended complaint[6] HBC alleged that the respondents and their co-conspirators[7] violated Sections 1 and 2 of the Sherman Act by conspiring to prevent HBC from expanding its hospital facilities; that respondents devised a scheme involving bad faith efforts to block authorization of the expansion, tactics to hold up implementation of petitioner's plans once authorization was obtained, and malicious instigation of adverse publicity and general public antipathy; and that the purpose of this conspiracy was to control the number of hospital beds, allocate patients and otherwise illegally restrain competition for medical-surgical hospital services in the Raleigh area. In addition, HBC alleged that the respondents had engaged in the following specific abuses of the administrative and judicial processes of North Carolina: manipulation of the Planning Council so that it recommended rejection of HBC's application; protraction without good cause of proceedings before the MCC; conspiring with Ms. Denson, an Assistant Attorney General of North

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[6] The amended complaint was filed after the defendants moved to dismiss the original complaint for lack of subject matter jurisdiction.

[7] The named co-conspirators were Wake County Hospital System, Inc., which operates Wake; William F. Andrews, Sr., Administrator of Wake; and I.B. Holley, former chairman of the Planning Council. HBC subsequently named as additional co-conspirators Blue Cross-Blue Shield; the Planning Council; Assistant Attorney General of North Carolina Christine Denson; and the Joint Long Range Hospital Planning Committee of Wake County.

Carolina; and groundless and dilatory appeal of the MCC decision to state court (Pet. App. 4a-5a). HBC further alleged that after HBC obtained authorization to expand, Rex sought to impede construction by conspiring with Blue Cross-Blue Shield to have that insurer demand different and more onerous terms from HBC than from Wake and Rex (*id.* at 5a-6a).

The case was tried before a jury in 1980.[8] HBC presented evidence to prove the plan to prevent, and then to impede, its expansion program. The court instructed the jury that the alleged conspiracy to prevent HBC's expansion would be illegal per se under Section 1 of the Sherman Act (Pet. App. 12a). To clarify the verdict, the court directed the jury to answer seven special verdict questions (Cross-Pet. App. 1a-3a). The jury answered all of them in favor of HBC and found the defendants liable for approximately $2,440,000. The court then trebled this amount pursuant to 15 U.S.C. 15.

The court of appeals reversed and remanded for a new trial (Pet. App. 1a-22a). The court acknowledged that the anticompetitive acts allegedly committed by Rex and its co-conspirators "are generally *per se* violations of the antitrust laws" (Pet. App. 6a-7a).[9] Nonetheless, it held that the district court

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[8] Much of the eight-year delay between complaint and trial was occasioned by the district court's dismissal of the complaint for failure adequately to allege involvement with interstate commerce. The court of appeals affirmed. 511 F.2d 678. This Court, however, unanimously reversed and remanded for further proceedings. *Hospital Building Company* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[9] Respondents did not expressly challenge in the court of appeals the sufficiency of the evidence of their agreement with others to block the construction of petitioner's new hospital (see Pet. App. 2a).

erred in giving a per se instruction because it construed several federal health care statutes, which encouraged participation by local hospitals and others in planning to avoid needless duplication of health facilities, to be "in limited derogation of the normal operation of the antitrust laws" (*id.* at 12a). Accordingly, the court fashioned a "very narrow 'rule of reason'," which "is simply that planning activities of private health services providers are not 'unreasonable' restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities" (*id.* at 10a). The court stated that " 'planning' under this special rule of reason is not 'reasonable' if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants into or expanders within the same 'market' " (*id.* at 11a). Moreover, the fact-finder is to determine whether the duplication of facilities sought to be avoided by "planning" is "needless" or "needful" by reference to the needs of the consumer (*id.* at 12a).[10]

In addition to remanding for a new trial under this "rule of reason" standard, the court also addressed other issues relevant to that trial. First, on the

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[10] The court also held that defendants were similarly entitled to a new trial on the Section 2 claims (15 U.S.C. 2) in order to show that they were motivated by a desire to avoid needless duplication, and that the instruction the district court gave on the Section 2 claims—that good motives cannot excuse a violation—deprived defendants of their right to establish that defense. Pet. App. 21a.

sham exception to the *Noerr-Pennington* doctrine[11] the court, without discussing the sufficiency of the evidence, referred to one portion of the district court's instruction as "unnecessarily broad" and described another sentence as simply "erroneous" (Pet. App. 15a).[12] Second, it held (*id.* at 17a-20a) that there was sufficient evidence for the jury to find that the several-year delay in opening HBC's new hospital was proximately caused by Rex's conduct and that, if that conduct was found to violate the special rule of reason, the damages caused by the delay were an "antitrust injury" within the meaning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Finally, the court decided that the district court had not abused its discretion in declining to submit to the jury a special verdict question on HBC's preparedness to enter the Raleigh market in 1972 (Pet. App. 20a).

DISCUSSION

A. *No. 82-1633*

Under its self-styled rubric of a "special rule of reason," the court of appeals in effect created a new implied antitrust immunity that directly conflicts with this Court's teachings on the rule of reason and on implied antitrust immunity. Its error is particularly

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[11] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[12] The court also held that the evidence concerning Ms. Denson, Assistant Attorney General of North Carolina, showed only that at the Attorney General's behest she helped the Planning Council present its case to the MCC, and thus was insufficient to warrant submitting to the jury the question of her participation in the conspiracy (Pet. App. 16a).

significant since it occurs in the area of health care, one of the largest and fastest growing segments of the economy.[13] Accordingly, this Court should grant HBC's petition to correct the court of appeals' errors.

1. The jury found Rex liable for conspiring with Wake and others to exclude a competitor by means of a boycott and abuse of the administrative and judicial processes of North Carolina. The court of appeals itself recognized that such conduct is ordinarily illegal per se under Section 1 of the Sherman Act (Pet. App. 6a-7a). As this Court has repeatedly stated, group boycotts instigated by horizontal competitors that seek to bar or burden another competitor's access to a valuable resource are without redeeming competitive benefit. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *United States* v. *General Motors Corp.*, 384 U.S. 127, 145 (1966). Similarly, there can be little doubt that a conspiracy by competitors to exclude a rival through abuse of a state's regulatory and judicial processes is "inconsistent with the free-market principles embodied in the Sherman Act* * *." *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966). Such "[p]redation by abuse of governmental procedures" (R. Bork, *The Antitrust Paradox* 347 (1978)) can never benefit competition and transfers from public to private hands the power to limit competition. *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941).

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[13] In 1981, estimated expenditures for health care in the United States were $287 billion, or 9.8% of the gross national product. Gibson & Waldo, *National Health Expenditures, 1981*, 4 Health Care Financing Rev. No. 1 at 1 (Sept. 1982). The Department of Health and Human Services estimates that in 1982 the health care industry grew to $322 billion, or 10.5% of the gross national product.

Nonetheless, the court of appeals thought that Congress' desire to encourage hospital participation in local health care planning "is in limited derogation of the normal operation of the antitrust laws" and thus requires a "special rule of reason" analysis (Pet. App. 12a). This novel "special rule of reason" does not exist other than in the decision below. The court's analysis is simply a misapplication of established rule of reason principles cloaked in ill-fitting garb. As this Court stated in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978): "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." The Fourth Circuit's "special rule," however, would focus inquiry not on the competitive impact of the restraint, but on the "good faith" of the defendants and on whether the competition they admittedly suppressed was "needless" and thus not in the public interest. This is not a recognizable rule of reason inquiry. As the Court also stated in *Professional Engineers*, "the purpose of the analysis * * * is not to decide whether a policy favoring competition is in the public interest * * *. Subject to exceptions defined by statute, that policy decision has been made by the Congress" (435 U.S. at 692; footnote omitted).

The court of appeals' "special rule" is all the more unsound in light of this Court's recent decision in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982). There, the court of appeals had held that since competition does not work very well in the health care industry, courts should judge on a case by case basis the reasonableness of prices fixed by physicians. This Court reversed, noting that the court

of appeals' decision was inconsistent with Section 1. The Court held that the antitrust laws are fully applicable to the health care industry and prevent courts from deciding whether competition is suppressed to a socially desirable level. *Id.* at 348-351. It is equally inconsistent with the antitrust laws for a district court or jury, as required by the Fourth Circuit's rule, to determine whether the hospital capacity conspiratorially suppressed was "needful" or "needless." Indeed, it would require the judge and jury to make the sort of decisions made by expert regulatory agencies and traditionally shunned by courts. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

2. It may well be, as respondents argue (Br. in Opp. 15, 20, 25), that the court of appeals' "special rule" terminology merely signified an implied antitrust immunity. The court's discussion of the "special rule of reason" (Pet. App. 7a-13a; *id.* at 10a-11a) is couched in the language of implied immunity and relies on two cases involving such claims, *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981). If so, the court badly misconstrued the law of implied antitrust immunity.

Exemptions from the antitrust laws are to be construed narrowly and are limited to the scope clearly intended by Congress. See, *e.g.*, *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Abbott Laboratories* v. *Portland Retail Druggists Association*, 425 U.S. 1 (1976); *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973). Indeed, in *National Gerimedical* this Court rejected the argument, virtually identical to that adopted by the court of appeals (Pet. App. 10a), that private ex-

clusionary conduct is impliedly immune from the antitrust law if it is "only intended to further the purposes of [national health care legislation]" (452 U.S. at 388). It held instead that " 'only * * * a convincing showing of clear repugnancy between the antitrust laws and the regulatory system' " can justify an implied immunity, and immunity will not be implied unless it is " 'necessary to make the [subsequent law] work, and even then only to the minimum extent necessary' " (*id.* at 388-389). As this Court further explained, an implied immunity cannot be justified except where there is a "specific conflict between" the legislation under which immunity is claimed and the antitrust laws. *Id.* at 393. And there is no "specific conflict" unless the regulatory statute requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws. *Id.* at 389. Accord, *Silver* v. *New York Stock Exchange, supra; United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Application of the test enunciated in *National Gerimedical* shows that there is no "specific conflict" between the health care statutes the court of appeals relied on [14] and the antitrust laws. The anticom-

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[14] The court of appeals generally cited six statutes (Pet. App. 7a-11a) as the basis for an implied antitrust immunity: the Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040; the Hospital and Medical Facilities Amendments of 1964 to Hill-Burton Act, Pub. L. No. 88-443, 78 Stat. 447; the Comprehensive Health Planning and Public Health Services Amendments of 1966, Pub. L. No. 89-749, 80 Stat. 1180; the Partnership for Health Amendments of 1967 to the Hill-Burton Act, Pub. L. No. 90-174, 81 Stat. 533; the Heart Disease, Cancer, Stroke, and Kidney Disease Amendments of 1970, Pub. L. No. 91-515, 84 Stat. 1297; and the Medical

petitive conduct at issue here—an effort to exclude a competitor by an abuse of the North Carolina administrative and judicial processes and a boycott with Blue Cross-Blue Shield—is a clear violation of Section 1. And nothing in the text or legislative history of the health care statutes the court of appeals relied on indicates a congressional intent to require or authorize parties to engage in this sort of exclusionary conduct. Indeed, those statutes did not direct anyone—even governmental agencies—to limit entry. Although Congress desired to avoid "needless duplication" of hospital resources, it sought to achieve that goal through voluntary and precatory means.[15] Moreover, when Congress did adopt entry regulation in 1974 in the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 ("NHPRDA"), it granted state agencies —not private parties—authority to deny entry and provided procedural safeguards for the exercise of that power. See *National Gerimedical*, *supra*, 452 U.S. at 385. In light of that carefully delimited

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Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 91-296, 84 Stat. 336. As the court observed, "[n]one of the above mentioned health planning legislation contains an express exemption from the antitrust laws" (Pet. App. 9a).

[15] These diverse statutes provided funds to states for hospital construction, medical research and health planning. Each required, as a condition of federal funding, planning by the state and receipt by state officials of advice from broadly constituted advisory bodies. Participation by hospitals and other health care providers, however, was entirely voluntary. These statutes did not authorize anyone to enforce any planning decision by preventing (or requiring) the construction of a health care facility. Implementation of all planning decisions was to be achieved strictly by voluntary cooperation.

grant, it would be especially anomalous to conclude that Congress intended in enacting the earlier legislation to imply authorization for private parties to engage in unsupervised entry regulation. See S. Rep. No. 93-1285, 93d Cong., 2d Sess. 52 (1974).[16]

3. The court of appeals' erroneous "special rule of reason" merits correction now, for it has the capacity for substantial mischief. It confuses the law relating to both the rule of reason and implied antitrust immunity in the vast and growing health care industry, where the lower courts appear to have had considerable difficulty in applying antitrust law correctly. See *National Gerimedical, supra; Arizona* v. *Maricopa County Medical Society, supra*; *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted, No. 82-1031

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[16] The court of appeals suggested (Pet. App. 9a-10a), as do respondents (Br. in Opp. 24), that private health care providers might be deterred from participating in "planning" activities unless their activities are immune from antitrust scrutiny. But the gravamen of petitioner's complaint concerns, not the defendants' planning activities, but their efforts to enforce their plans by anticompetitive exclusionary conduct. Private parties may participate in planning and lend their expertise to local planning entities (Pet. App. 10a) without engaging in conduct designed to bar others from competing. For the same reason, respondents' argument that their conduct it "identical in principle to the good faith 'cost-saving cooperation among providers' [that] this Court suggested [might] be immune in footnote 18 of *National Gerimedical*" (Br. in Opp. 24; footnote omitted) misses the mark. The voluntary cooperation contemplated by the Congress in the NHPRDA and discussed by the Court in *National Gerimedical* (452 U.S. at 384-385) is entirely different from the conduct challenged in this case—a concerted effort to deny a competitor the opportunity to compete.

(March 7, 1983).[17] Moreover the court of appeals' decision risks spilling over into other regulated areas of the economy and further clouding sound antitrust analysis.

It is, of course, true, as respondents state (Br. in Opp. 16), that the court of appeals' ruling is interlocutory. This Court, however, has granted plenary review of interlocutory decisions that present an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern & E. Gressman, *Supreme Court Practice*, 301 (5th ed. 1978); *e.g.*, *Arizona* v. *Maricopa County Medical Society*, *supra*, 457 U.S. at 339. This case satisfies these criteria. The Fourth Circuit's new "special rule of reason" raises an issue of general importance. That issue is fundamental to the further conduct of the case, for the court of appeals has directed that on remand the district court permit defendants to raise the "special rule of reason" defense (Pet. App. 13a). Finally, the issue is clearly presented: the court of appeals identified only the district court's per se instruction as reversible error (*ibid.*). Although the court also disapproved of portions of the district court's *Noerr-Pennington* instructions[18] and found insufficient evidence to connect the

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[17] Thus, although the statutes involved here have now been superseded (Br. in Opp. 17) the court's flawed method of analysis remains troubling, for the court would doubtless apply it to the NHPRDA and other currently governing health statutes.

[18] It is, of course, axiomatic that jury instructions must be judged as a whole, and not in particular isolated sentences. *United States* v. *Park*, 421 U.S. 658, 674 (1975). Since the court did not reverse on this basis, however, it felt no necessity

Assistant Attorney General of North Carolina to the alleged conspiracy (Pet. App. 15a-17a), it did not identify these as reversible errors, but only as matters that should be addressed on remand, since "the matter must be retried" because of the per se instruction.

4. Similar considerations counsel in favor of granting the petition to review the court of appeals' holding under Section 2 (attempt to monopolize and conspiracy to monopolize). The court transposed its novel Section 1 "good intentions" defense to the context of Section 2 analysis and concluded (Pet. App. 21a) that "defendants [have the] right to prove that they were motivated by intent to avoid 'needless' duplication rather than specific intent to monopolize." Since the district court's jury instructions precluded this defense, the court of appeals reversed.

Where defendants have engaged in unambiguously exclusionary acts, such as those involved here, with the intent to achieve monopoly power or to exclude competition, the mens rea element of the offense of attempt or conspiracy to monopolize has been established. See, *e.g.*, *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948). And this is essentially what the district court charged the jury (Pet. App. 30a-

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to decide whether the *Noerr-Pennington* instructions as a whole required reversal. In fact the instructions read in their entirety (see App., *infra*) informed the jury, in conformity with *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), that conduct before courts or agencies loses its constitutional protection and antitrust immunity if it is both abusive of courts or agencies and intended to harm a competitor. Finally, it would be open to the court of appeals on remand from this Court to decide whether the insufficiency of the evidence of the state official's involvement in the conspiracy (see page 7 note 12 *supra*) was reversible error.

33a). While a legitimate business purpose may negate the specific intent required in attempted monopolization cases (see, *e.g.*, *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626-627 (1953); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 532-533 (1948)), that is not the defense the court of appeals addressed. Rather, the court created a new version of the legitimate business purpose doctrine for use in the health care industry (Pet. App. 21a). Under this freshly-minted standard a defendant could seek to excuse his anticompetitive behavior simply because he believed his acts were in furtherance of the statutory goal of eliminating "needless duplication." But, as we discuss above, when a decision on the "need" for health care expansion is called for, it is to be made by the public bodies created for that purpose.[19] Private entities, such as defendants, may participate in that process but are granted no license either to abuse the process or to engage in violations of the antitrust laws to advance their own objectives. The decision below, which would permit a party to defend on this basis, is an unwarranted departure from existing law and should be reversed.

B. *No. 82-1762:*

Rex's contentions that the court of appeals erred in affirming the district court's refusal to submit a special written question on HBC's preparedness to enter the market and in allowing recovery of damages alleged to be unrelated to antitrust injury (82-1762 Cross-Pet. (i)) are insubstantial and do not merit further review.

1. There was conflicting evidence at trial whether HBC was prepared to enter the Raleigh hospital

[19] In this case the North Carolina authorities found a need for HBC's expansion. See page 3, *supra*.

market in 1972 (Pet. App. 20a). Accordingly, the district court instructed the jury that in order to show that the defendants proximately caused its injury, HBC had to establish that it was prepared to expand its business in 1972 (HBC Br. in Opp. App. 11a). The court listed four items HBC was required to show to make out its case of readiness to expand: ability to finance the expansion; consummation of contracts; affirmative action to expand; and appropriate background and experience (*id.* at 12a). Finally, the court submitted to the jury, pursuant to Fed. R. Civ. P. 49(a), a written question whether the defendants' conduct proximately caused injury to HBC's business. 82-1762 Cross-Pet. App. 2a. The jury answered the question "yes".

Rex claims that because the district court declined to submit a separate special verdict question on the preparedness issue, it wrongly withdrew that issue from the jury. 82-1762 Cross-Pet. 10. This contention is incorrect. Special verdict questions are very helpful in antitrust and in other complex litigation; and district courts should look with favor upon requests for their use. *E.g.*, *Bissett* v. *Ply-Gem Industries, Inc.*, 533 F.2d 142, 150 (5th Cir. 1976); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Nevertheless, while a party is entitled to have all material factual issues presented to the jury, it has no right to have them presented in the form of special verdict questions. As the court of appeals correctly held (Pet. App. 20a), it is within the district court's broad discretion whether to submit such questions. *Tights, Inc.* v. *Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.), cert. denied, 429 U.S. 980 (1976); *Miley* v. *Oppenheimer & Co.*,

637 F.2d 318, 334 (5th Cir. 1981). And where a court has chosen to combine instructions with special verdict questions under Fed. R. Civ. P. 49(a), procedural fairness requires only that the written questions read together with the general instructions fairly present the issue to the jury. See *Columbia Plaza Corp.* v. *Security National Bank*, 676 F.2d 780, 789 (D.C. Cir. 1982); *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 649 (3d Cir. 1980); *Dreiling* v. *General Electric Co.*, 511 F.2d 768, 774-775 (5th Cir. 1975); *Perzinski* v. *Chevron Chemical Co.*, 503 F.2d 654, 660 (7th Cir. 1974). In this case, the general instructions and special verdict question No. 4 together provided just such a fair presentation.[20]

2. The court of appeals held (Pet. App. 17a-18a) that there was sufficient evidence for the jury to find that the defendants' anticompetitive actions proximately caused both the delay of construction of HBC's hospital until February 1973, when the state certificate of need law was invalidated, and further substantial delay by exposing HBC to the new require-

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[20] The present case is thus not in conflict with the cases cited by Rex (82-1762 Cross-Pet. 9) in which the instructions read together with the special questions did not permit the jury to find for a party even though it might have believed that party's contention on a disputed and controlling issue. See *Simien* v. *S.S. Kresge Co.*, 566 F.2d 551, 556 (5th Cir. 1978) (product liability case in which special questions did not permit the jury to find for the defendant on the ground that, as the defendant claimed, it did not sell plaintiff the offending product in question); *Cutlass Productions, Inc.* v. *Bregman*, 682 F.2d 323, 327 (2d Cir. 1982) (breach of contract action in which special questions did not permit the jury to find for the defendant on the ground that, as defendant claimed, the contract, if any, was an employment contract terminable for cause).

ments of Section 1122 of the Social Security Act, 42 U.S.C. 1320a-1, and to rising interest rates and other difficulties. Rex does not seek review of this ruling. It does, however, claim that the court of appeals erred when it also held that "delay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged 'allocation of the market' and 'refusal to deal' were likely to cause and [Rex] cannot escape liability merely because the injurious delay was compounded by enactment of the § 1122 amendments and rising interest rates" (Pet. App. 19a-20a). Rex contends (82-1762 Cross-Pet. 12) that this holding is contrary to the rule set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that a plaintiff may recover only for "antitrust injur[ies]."

The court of appeals' ruling is entirely in accord with *Brunswick*, however. In *Brunswick* the Court denied recovery to a plaintiff whose only claim of injury from an acquisition allegedly violative of Section 7 of the Clayton Act (15 U.S.C. 18) was that, but for the acquisition, the acquired firm would have gone out of business and plaintiff would have faced less competition and made more money. The Court explained that to allow such a suit "divorces antitrust recovery from the purposes of the antitrust laws * * * and would authorize damages for losses which are of no concern to the antitrust laws" (429 U.S. at 487; footnote omitted). In the present case, by contrast, the injuries for which Rex has been held liable are central to the concern of the antitrust laws, for competition with the defendants was stifled as the expectable and proximately caused result of the defendants' anticompetitive conduct. The fact that Rex's unlawful exclusion of HBC lasted so long that sub-

sequent events delayed HBC's entry even further provides no basis under *Brunswick* or any other precedent for excusing Rex from liability for all of the injury proximately caused by its exclusionary conduct.

CONCLUSION

The petition for a writ of certiorari should be granted in No. 82-1633 and denied in No. 82-1762.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

Civil Action File No. 4048

HOSPITAL BUILDING COMPANY, PLAINTIFF

v.

TRUSTEES OF THE REX HOSPITAL, a corporation, JOSEPH BARNES, and RICHARD URQUHART, JR., DEFENDANTS

COURT'S INSTRUCTIONS TO THE JURY

* * * * *

First Amendment Immunity

If you find that the defendants' conduct is not protected by the State action immunity that I have just described to you, you must also consider whether a second immunity applies to defendants' actions before the North Carolina Medical Care Commission and the Superior Court of Wake County. This second immunity is based on the principle that activity protected by the First Amendment to the United States Constitution may not be made the basis of a violation of the antitrust laws. The First Amendment to the Constitution protects the rights of free speech and the right to petition the government.

No violation of the antitrust laws can be predicated upon mere attempts to influence the passage or enforcement of laws. Therefore, the antitrust laws do not prohibit two or more persons from associating together in an attempt to persuade the government to take particular action with respect to a law that would produce a restraint or monooply. The right of petition is one of the freedoms protected by the Bill of Rights.

For all purposes in determining whether an action was made under the First Amendment right to petition the government, "government" includes the executive, legislative, judicial and regulatory bodies, including the North Carolina Medical Care Commission and the Superior Court of Wake County. Therefore, the immunity from the antitrust laws for seeking a governmental determination applies to adjudicatory agencies such as the North Carolina Medical Care Commission and the courts such as the Wake County Superior Court. That is because groups with common interests do not violate the antitrust laws when they use the channels and procedures of State agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors even if direct injury to their competitors was an incidental result of those activities.

This immunity from the antitrust laws is not limited to the expression of political views; rather, the immunity also applies to advocating a person's business and economic interests in relation to his competitors.

Defendants' First Amendment right to seek governmental action does not depend on their motive or intent in seeking governmental action. Thus, an anti-

competitive purpose does not make the conduct illegal. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.

However, this Constitutionally protected activity is not absolute. Thus, if plaintiff proves by a preponderance of the evidence that defendants' actions were a mere sham to cover what was nothing more than an attempt to interfere directly with the business relationship of a competitor, such actions do not enjoy immunity from the antitrust laws. In this connection, conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws. Examples of such conduct include:

1. unethical conduct;
2. conspiracy with representatives of an adjudicatory agency;
3. barring of free and unlimited access to an adjudicatory agency;
4. misrepresentation; and
5. groundless litigation.

Plaintiff has the burden of proof of establishing by a preponderance of the evidence that defendants' alleged conduct was an abuse of the adjudicatory or judicial process which was part of a larger conspiracy to restrain trade or to monopolize a market.

With respect to the adjudicatory process, if the acts of a counsel for an adjudicatory agency were those of a participating conspirator, then the conduct of any other member of the conspiracy before the agency would not be immunized from the antitrust laws.

Again, plaintiff has the burden of proof of establishing such acts by a preponderance of the evidence.

If the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity. On this aspect, too, the burden of proof is on the plaintiff.

As I have said before, even if you find that defendants' conduct is not immune from the antitrust laws, that finding does not satisfy the plaintiff's burden of proving the usual elements of an antitrust violation. Plaintiff still has the burden of proving the usual elements of an antitrust offense.

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